Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. ——— 79-974

STATE OF MINNESOTA,

Petitioner,

vs.

BERNARD CLARK, GARY ALLEN STEWART, JACK FULSTROM, ALBERT LeROY BRUNNER, EDWARD JACK LARSON, LESTER DEAN FINEDAY, MARVIN JOSEPH FRENCH, LEONARD EUGENE BUTCHER, HAROLD OWEN ANNETTE, HAROLD L. BROWN, ALVIN FRANCES GJUSTRUM, WALTER BUTCHER and LEONARD BUTCHER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The petitioner State of Minnesota respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Minnesota which affirmed the dismissal of prosecutions of thirteen Chippewa Indians for violations of state game and fish laws.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court was issued August 3, 1979, and is reported in 282 N.W.2d 902. The opinion is set out in Appendix A, *infra*. The order of the state district court which the Minnesota Supreme Court affirmed is unpublished and is set out in Appendix B, *infra*.[1]

JURISDICTION

The opinion of the Minnesota Supreme Court was filed August 3, 1979. The time for filing a petition for rehearing was extended until August 27. A timely petition for rehearing was denied on October 1, 1979, and final judgment was entered on that date (Appendix C, *infra*). On November 11, 1979, the Minnesota Supreme Court ordered execution of judgment stayed for ninety days from its final entry, stating that additional extensions of the stay should be directed to the United States Supreme Court (Appendix D, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). The issues in this case involve the interpretation of federal statutes, agreements and treaties, and special rights claimed thereunder. Under Rule 22 of the Rules of the Supreme Court this Petition for Certiorari is due on or before December 31, 1979.

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[1] Although there were thirteen separate prosecutions involved in this situation, the state district court consolidated the proceedings for purposes of its order for dismissal. The Minnesota Supreme Court assigned a separate number for the appeal on each prosecution, but the court also consolidated all the appeals and treated them as one. The State of Minnesota, pursuant to Rule 23(5) of the Rules of the Supreme Court of the United States, here files one petition covering all thirteen prosecutions dismissed by the Minnesota Supreme Court.

QUESTION PRESENTED

I. Whether the Act of January 14, 1889 (the so-called Nelson Act), as subsequently agreed to by the White Earth Band of Chippewa Indians, had the effect of disestablishing the original White Earth Indian Reservation, thereby giving the State of Minnesota jurisdiction over hunting and fishing by enrolled members of the Band on non-Indian lands.

STATUTES AND AGREEMENTS INVOLVED

There are three statutes or agreements primarily involved with the present case.

1. *Act of January 14, 1889 (Nelson Act), 25 Stat. 642, I Kappler 301.* The full text of the Nelson Act is set out in Appendix E, *infra*. Its most pertinent provision appears at the beginning of section 1 and reads as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not

have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated. . . .

2. *Agreement with the White Earth Band of Chippewa Indians Entered Into Pursuant to the Nelson Act, H. Exec. Doc. No. 247, 51st Cong. 1st Sess. (1890).* The agreement is set out in full in Appendix F, *infra*. Its most pertinent provision reads as follows:

> We the undersigned . . . do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding the act of Congress approved January 14, 1889, of which the following is a copy, to wit:
>
> [The text of the Nelson Act appears here]
>
> And after such explanation and understanding have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof, and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said White Earth Reservation as is not embraced in the following described boundaries, to wit: . . .
>
> [There follows a description of the entire White Earth Reservation except the four northern townships in Range 37 west]
>
> for the purposes and upon the terms stated in said act, which said lands, embraced within said boundaries have been reserved by the commissioners appointed under said act and as therein authorized, for the purpose of making and filling the allotments therein provided for . . . .

3. *18 U.S.C. § 1162 (part of Public Law 280).* This section is set out in full in Appendix G, *infra*.

STATEMENT OF THE CASE

The White Earth Indian Reservation was created by the Treaty of March 19, 1867, 16 Stat. 719, II Kappler 974. Subsequently, in 1889, the lands not needed for allotments in that reservation were ceded to the United States pursuant to the Nelson Act. In 1953 Congress enacted Public Law 280 (18 U.S.C. § 1162, 28 U.S.C. § 1360), the provisions of which were applied automatically to all Indian country within Minnesota except for the present Red Lake Reservation. These are the laws and agreements at the heart of the present controversy.

The dispute in this case focuses on whether a formal reservation still exists within the 1867 reservation boundaries, or whether the reservation was disestablished by the operation of the Nelson Act as subsequently agreed to by the White Earth Band of Chippewa Indians. The disestablishment issue is critical because, as noted by the Minnesota Supreme Court, "the land involved here is 'Indian country' only if it lies within the limits of an Indian reservation." 282 N.W.2d 902, 905. If there is no formal reservation the state has jurisdiction to enforce its game and fish laws against Indians on the lands involved in this case.

The facts of the case are essentially undisputed. A factual stipulation and full set of exhibits were agreed to by the parties and filed in court. The defendants in the state court action are all enrolled members of the White Earth Band of Chippewa Indians (Stipulation, ¶ 1). The defendants were arrested for violations of Minnesota state game and fish laws.[2]

[2] Violations of state law included spearing walleyes with the aid of a light, transporting loaded uncased firearms, and "shining" for deer with a spotlight at night.

(Stipulation, ¶¶ 3-10). These violations all occurred on non-Indian land (*i.e.*, land not owned by or for the Minnesota Chippewa Tribe, the White Earth Band, or individual Indians) within the 1867 boundaries of the reservation (Stipulation, ¶¶ 3, 5, 7, 9 and 11).

The state district court of Becker County, Seventh Judicial District, dismissed the prosecutions on grounds that the Indians had treaty rights to hunt within the 1867 reservation boundaries, that the reservation had not been disestablished, and those rights had not been eliminated. Therefore the Indians were not subject to state reguiation. The State of Minnesota, on behalf of Becker County, appealed the dismissals to the Minnesota Supreme Court. The issue presented to the Minnesota Supreme Court was whether the defendants can be prosecuted for violations of state game and fish laws occurring on lands owned in fee by non-Indians and within the 1867 reservation boundaries. Resolution of the issue in large part turns upon whether the original reservation had been disestablished by the Nelson Act in 1889.

There are a few additional pertinent facts which were stipulated to by the parties. The original 1867 reservation contained thirty-six townships of land in a square form, or approximately 854,741 acres (Stipulation, ¶¶ 14 and 21). After the Nelson Act of 1889 most of the land was allotted to individual Indians and eventually passed out of trust status (Stipulation, ¶¶ 45-50). As a result, as of today only 56,116 acres out of the 854,741 acres are owned by the United States in trust for the White Earth Band or for individual Band members (Stipulation, ¶¶ 30-31). There are 514,640 acres of private land within the 1867 reservation boundaries, most of which is held by non-Indians (Stipulation, ¶ 32). The State

of Minnesota, the counties of Becker, Clearwater and Mahnomen, and the federal government each owns substantial acreage within the 1867 reservation borders (Stipulation, ¶¶ 23-29). Additionally, there are over twice as many non-Indians as Indian people who make their homes within the original reservation borders, the population figures being approximately 7,248 non-Indians in 1970 and 3,100 Indians in 1974 (Stipulation, ¶¶ 19-20).

It is further significant that with regard to past exercise of state jurisdiction, all parties have acknowledged that it has been the consistent policy of the State of Minnesota to enforce its game and fish laws against Indians within the 1867 reservation borders except on tribal lands or allotted trust lands, and to enforce its game and fish laws against non-Indians everywhere within the 1867 reservation borders (Stipulation, ¶¶ 42-43). Other facts relating to the history of the reservation and provision of federal services to the White Earth Band can be found in the parties' factual stipulation, and the other documents relevant to the case are identified in the parties' stipulated exhibits.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Minnesota Supreme Court Is In Conflict With The Decisions Of This Court And The United States District Court For The District Of Minnesota.

The most substantial reason for granting certiorari in this case is that the decision of the Minnesota Court is contrary to the holding and reasoning of the decisions of this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and the decision of the United States District Court for the District of Minnesota in *United States v. Minnesota*, 466 F. Supp. 1382 (1979), *appeal docketed*, No. 79-1420 (8th Cir., June 1, 1979). As a result, the status of these federal cases and their guidelines in Minnesota is uncertain at best.

The *DeCoteau* and *Rosebud* decisions held that certain Acts of Congress in the late 1800's and early 1900's had diminished or disestablished Indian reservations[3] in South Dakota. These two cases expanded upon the earlier decisions of *Seymour v. Superintendent*, 368 U.S. 351 (1962) and *Mattz v. Arnett*, 412 U.S. 481 (1973), and set forth the prevailing guidelines and principles for determining whether reservations or portions thereof have been disestablished. The Minnesota Supreme Court, though paying lip service to *DeCoteau* and *Rosebud*, ignored their principles and instead relied on an earlier decision of its own (*State v. Forge*, 262 N.W.2d 341 (1977)) which in turn was based on a pre-*DeCoteau* ruling of the United States District Court for the District of Minnesota (*Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.

[3] The reservations affected were the Lake Traverse Sioux Reservation and the Rosebud Sioux Reservation.

Supp. 1001 (1971)).[4] The Minnesota court held that the White Earth Reservation had not been disestablished by the Nelson Act, and that therefore the State could not enforce its game and fish laws against Indians inside the reservation. While so doing, the court further reaffirmed the position it took in *Forge* that as a general proposition "congressional intent to terminate is lacking from the Nelson Act." 282 N.W.2d 902, 906.

The State of Minnesota believes that the decision in the present case ignored what should have been controlling precedent, particularly *DeCoteau*, in its analysis of the Nelson Act and the White Earth Reservation. The State also believes that the court's broad statements about the general purpose of the Nelson Act ignore the Act's clear wording, ignore direct evidence of congressional intent, and therefore violate the guidelines of both *DeCoteau* and *Rosebud*. Since the Nelson Act affected at least ten other Minnesota Indian reservations existing in 1889 encompassing over four and one-half million acres, the Minnesota Supreme Court's ruling sets the stage for other state court rulings in the future which will also be at odds with the precedent of this Court.

A very brief discussion of the Nelson Act and the circumstances surrounding its passage will help indicate the nature of the Minnesota court's error. There is no dispute that it is Congressional intent which determines the disestablishment issue. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977).

[4] In both *Forge* and *Leech Lake* it was found that the Nelson Act had not disestablished the Leech Lake Indian Reservation even though all lands in the reservation except for allotments had been ceded pursuant to that Act. In particular, the Minnesota Supreme Court stated in *Forge* that congressional intent to disestablish was lacking from the Nelson Act despite the use of cession language in the Act and subsequent agreements, language that this Court has found to be "precisely suited" to disestablishment. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597; *DeCoteau v. District County Court*, 420 U.S. 425, 445.

The history of the Nelson Act probably dates from 1886 when Congress authorized the Secretary of Interior to negotiate with the Chippewa Indians of Minnesota for modifications of their treaties and changes in their reservation. This was in line with prevailing policy of the time which was to reduce existing reservations and to civilize and assimilate Indians. The push to reduce or eliminate reservations in Minnesota, as elsewhere, came in large part from settlers' desires for more and more land. This Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) aptly described the "familiar forces" at work to open up reservation lands to general settlement.

Acting on his 1886 authorization the Secretary of Interior sent a commission (the so-called Northwest Indian Commission) to negotiate with Minnesota's Chippewas. The commission negotiated two agreements with the state's Chippewas, and presented the agreements to Congress for ratification. The agreements, if ratified, would have vacated most of the state's reservations (except Red Lake and White Earth) and made White Earth the home for all the Chippewas except the Red Lake and Pembina Bands. Land would be allotted to Indians on White Earth, and any remaining land would be patented in common to the Bands residing on White Earth.

Congress strongly criticized the agreements because they did not go far enough in breaking up tribal relations and tribal lands. Congress was particularly disturbed about keeping land in tribal ownership. The House Committee on Indian Affairs, in reacting to the agreements, said:

> It is now conceded on all hands that the only safe and practical way to civilize the Indians is by alloting lands in severalty to them — *breaking up their tribal relations*

> *and ownership in common*, and putting them to work on their allotments. . . .

H. R. Rep. No. 789, 50th Cong., 1st Sess. at 3 (1888), hereafter "State Exhibit S-J" (emphasis added).

Because of its objections to the agreements, Congress refused to ratify them. In place of the agreements, the House Committee on Indian Affairs drafted and reported out H.R. 7935. As subsequently enacted, this bill became known as the Nelson Act, named after Senator Knute Nelson of Minnesota, one of the foremost proponents of the legislation. The House Committee explained the bill in part as follows:

> The bill is in the nature of a proposal to the Indians, and if not accepted by them is inoperative, and nugatory. If accepted and assented to by at least two-thirds of the male adults on each band, the bill, if passed, becomes effective. *In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens, to allot ample land to each of them in severalty, to dispose of the residue of the lands. . . .*

State Exhibit S-J at 6 (emphasis added).

In other words, the intent was to disestablish reservations, allot lands to individual Indians, break up the tribes, and thereby "civilize" and assimilate the Chippewas. The language in Section 1 of the Nelson Act itself was suited to that end:

> [A]s soon as practicable after their appointment [the Commissioners shall] negotiate with all the different bands for the *complete cession and relinquishment* in writing *of all their title and interest in and to all the reservations in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much*

> *of these two reservations as in the judgment of said commission is not required to make and fill the allotments* required by this and existing acts . . .; and the acceptance and approval of such *cession and relinquishment* by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and shall *operate as a complete extinguishment of the Indian title* without any other or further act or ceremony whatsoever. . . .

Emphasis added. As this Court has pointed out cession language of this type is "precisely suited" to disestablishment. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 485, 597; *DeCoteau v. District County Court*, 420 U.S. 425, 445.

Pursuant to the terms of the Nelson Act President Harrison on February 26, 1889 appointed a commission known as the United States Chippewa Commission to negotiate with the Chippewas. The commission negotiated separate agreements with various bands of Minnesota Chippewas in which the terms of the Nelson Act were ratified and accepted. Although it would not be appropriate here to examine the record in detail, the transcript of the negotiating sessions with the White Earth Band shows that the negotiations conducted by the commission and the commissioners' representations were consistent with the intent of the Nelson Act. In any event, the terms and intent of Congress were not open to negotiation. Congress made the Chippewa Bands an offer and in effect said take it or leave it, but do not change it. In this case the White Earth Band accepted Congress' offer, "consented and agreed" to it and "ratified the same."

The result of the White Earth Band's acceptance of the Nelson Act was that the Band completely "ceded" all their interest whatsoever to four townships of the reservation, with the remaining land to be used only to make the allotments required by the Act.[5] Allotments were ultimately made on over 95% of the retained land.

In holding that Congress did not mean to disestablish the formal White Earth Reservation by the Nelson Act, the Minnesota court ignored both clear contemporaneous indications of Congressional intent as well as this Court's ruling and rationale in the *DeCoteau* case. In *DeCoteau* the Court held that an agreement which ceded all unallotted lands in the Lake Traverse Reservation had the effect of disestablishing that reservation. The *DeCoteau* rationale, in part, was as follows:

> It is true that the Sisseton-Wahpeton Agreement was unique in providing for the cession of all, rather than simply a major portion of the affected tribe's unallotted lands. But as the historical circumstances make clear, this was not because the tribe wished to retain its former Reservation, undiminished, but because the Tribe and the Government were satisfied that *retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited* to the retained allotments. 18 U.S.C. § 1151(c). . . . With the benefit of hindsight, it may be argued that the tribe and the government *would have been better advised to have carved out a diminished reservation, instead*

[5] The court sidestepped the issue of the cession of the four townships, saying, "Our decision in this case applies only to land lying within the 32 townships of the White Earth Indian Reservation remaining after the 1889 cession. The other four indicated townships are therefore not significant to this decision." 282 N.W.2d 902, 906, n. 13. This statement, when combined with other statements affirming earlier decisions about the intent of the Nelson Act, just leads to more confusion over the Nelson Act and the authority of *Rosebud* and *DeCoteau* in the state of Minnesota.

> *of or in addition to the retained allotments.* But we cannot rewrite the 1889 agreement and the 1891 statute. For the courts to reinstate the entire reservation, on the theory that *the retention of mere allotments was ill-advised,* would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians.

DeCoteau v. District County Court, 420 U.S. 425, 446-447 (emphasis added). That rationale applies to the White Earth situation as well. All unallotted lands (or lands not needed for future allotments) were ceded and the existence of allotments was intended to provide an "adequate fulcrum for tribal affairs."

The White Earth and *DeCoteau* situations are amazingly similar. The reservations in both instances were created by treaty in 1867. They were approximately the same size. At present the land within the original borders of both reservations is predominately non-Indian. In both cases the dispute centered on state jurisdiction over Indians on non-Indian land; there is no dispute that the State is without jurisdiction on trust lands. Both the Lake Traverse agreement and the White Earth agreement were made in 1889 against the backdrop of the same general government policy.

The most important similarity, though, is in the terms of the 1889 agreements. The Sioux of Lake Traverse ceded all of their land that was not already allotted or that was not needed for future allotments. The result was that Indians still owned much land, but in the form of allotments, not in tribal ownership. What ultimately was not needed for allotments was sold.

This is exactly what happened in White Earth. The White Earth agreement ceded all the land that was not already allotted or that was not needed for future allotments. The only difference between the two situations is that in Lake Traverse many allotments had already been made and only a small amount remained to be granted in the future. In White Earth only a small amount of land had been allotted already, and the larger amount was to be allotted in the future. This difference, however, does not alter the similarity of the terms, approaches, and intent of the agreements and Congressional action for those two reservations.

In summary, the *DeCoteau* and White Earth situations are so similar as to require similar results. Their history, timing, context, terms, subsequent jurisdictional history and present demographic characteristics are analogous. The face of the Nelson Act, the circumstances surrounding the Act, its legislative history, and the subsequent jurisdictional history of White Earth all point toward disestablishment.

The Minnesota Supreme Court's opinion has done four things which have major far-reaching effects. First, it has obviously ignored what should be controlling precedent by this Court in the form of the *DeCoteau* holding. Secondly, it has ignored clear indications of congressional intent in violation of the directives of both *DeCoteau* and *Rosebud.* Thirdly, it has minimized the importance of specific language of cession, language which this Court in *DeCoteau* and *Rosebud* said was "precisely suited" to disestablishment. And finally, despite compelling evidence of congressional intent, it has reiterated its opinion that the basic purpose of the Nelson Act was not disestablishment.

In its conclusions about the intent of the Nelson Act, the Minnesota Supreme Court has also come into conflict with the 1979 decision of the United States District Court for the District of Minnesota in *United States v. Minnesota,* 466 F.

Supp. 1382. In that case Chief Judge Edward J. Devitt reinterpreted[6] the Nelson Act in light of *Rosebud* and *DeCoteau*, and determined in a case involving an 1889 agreement with the Red Lake Band that:

> The legislative history of the 1889 Nelson Act makes no mention of reserved hunting and fishing rights, *but rather makes clear that the purpose of the Act is to restore the land to the public domain and open it to settlement by whites.*

466 F. Supp. at 1387 (emphasis added).[7] In other words, Judge Devitt concluded that the effect of the Nelson Act was disestablishment.

These conflicts make clear the confusion that will exist within the State of Minnesota if certiorari is not granted. The federal courts and state courts are going in different directions. If uncorrected, the situation invariably will lead to uncertainty, contrary judgments, forum shopping and bad law. It is important that certiorari be granted to eliminate conflicts and provide one guiding rule of law for all the courts.

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[6] Judge Devitt was the author of the 1971 decision of *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, which has been used by the Minnesota Supreme Court to support its position that the intent of the Nelson Act was not to disestablish.

[7] Restoration of Indian reservation lands to the public domain terminates the reservation status of the lands affected. *See, e.g., DeCoteau v. District County Court*, 420 U.S. 425, 446 (1975). *Mattz v. Arnett*, 412 U.S. 481, 504 n. 22 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962).

II. The Issues Ruled Upon By The Minnesota Supreme Court Are Of Broad Importance Both Within And Outside The State.

As mentioned earlier, several treaties involving millions of acres were made with the Chippewas in 1889 pursuant to the Nelson Act. The correct interpretation of that Act is of immense jurisdictional significance within the state. Not only are Indian hunting and fishing rights at stake, but ultimately so is general state regulatory and tax jurisdiction,[8] and probably the issue of Indian jurisdiction over non-Indians. Even now there are several cases in state and federal courts which at least in part require an interpretation of the Nelson Act.[9] There is little doubt that many more such cases will arise in the future. Enormous litigation expense and judicial time may be saved if the Nelson Act could be given a uniform authoritative interpretation. There is little doubt that the resolution of the disestablishment issue on White Earth and an examination of the purpose of the Nelson Act is of broad and general importance to Minnesota.

Additionally, the issue of disestablishment may be of substantial importance to other states struggling with the same problems as Minnesota. Many statutes similar to the Nelson Act were passed in the late 1800's and early 1900's. Interpretation of the Act in this case will assist interpretation elsewhere. Also, granting certiorari in this instance will be an indication that the recent principles of *Rosebud* and *DeCoteau* are meant to be considered seriously by state courts ruling on disestablishment matters.

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[8] Even though Minnesota is a Public Law 280 state for criminal and civil jurisdiction, there are still uncertain limits to the extent that "civil jurisdiction" includes state regulatory and tax laws. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373 (1976).

[9] In one case currently in United States District Court a determination on whether to re-examine the disestablishment issue in White Earth may depend on the disposition of this petition.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted. The matter should be scheduled for argument on the merits, or in the alternative, be remanded to the Minnesota Supreme Court for further consideration in light of *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). *See Appawora v. Brough*, 431 U.S. 901 (1977).

Respectfully submitted,

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December, 1979

APPENDIX

APPENDIX A
OPINION OF THE MINNESOTA SUPREME COURT,
282 N.W. 2D 902 (1979)
BECKER COUNTY

STATE OF MINNESOTA,
Appellant,
vs.
BERNARD CLARK, JACK FULSTROM, et al.,
Respondents.

SCOTT J.
Concurring specially,
TODD, J., YETKA, J.,
PETERSON, J., OTIS, J.
Took no part, KELLY, J.
Endorsed
Filed August 3, 1979
JOHN McCARTHY, Clerk
Minnesota Supreme Court

SYLLABUS

The Nelson Act did not disestablish the White Earth Indian Reservation, and thus the state's jurisdiction to regulate Indian activities within the boundaries of that reservation is limited to that granted by Public Law 280.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

SCOTT, Justice.

This matter consists of appeals by the State of Minnesota from an order of the Becker County District Court dismissing the prosecutions of thirteen Chippewa Indians for violations of state game and fish laws. We affirm.

The pertinent facts are presented upon stipulation of the parties. Defendants are enrolled members of the White Earth Band of Chippewa Indians.[1] Each defendant was arrested for violating a state game or fish law[2] on tracts of land not owned by or for the Minnesota Chippewa Tribe, the White Earth Band, or an individual Indian, but within the boundaries of the White Earth Reservation as established by the Treaty of 1867.[3]

Following their arrests, the defendants moved the district court[4] to dismiss the prosecutions on the ground that the court lacked subject matter jurisdiction. The court granted these motions by order dated May 20, 1977. In a memorandum attached to its order the district court concluded that the state

[1] This band is one of the six Chippewa bands comprising the Minnesota Chippewa Tribe. The Minnesota Chippewa Tribe is a Federally-recognized Indian tribe organized under the Wheeler-Howard Act of 1934, 25 U.S.C.A., § 461 et seq. State v. Forge, 262 Minn. 341, 343, n. 2 (Minn. 1977), appeal dismissed, 435 U. S. 919, 98 S. Ct. 1479, 55 L. ed. 2d 512 (1978).

[2] Defendants Fulstrom and Clark were charged with spearing walleyes with the aid of a light, a misdemeanor. Defendants Brunner, Larson, French, Leonard E. Butcher, Walter Butcher, Annette, Gjustrom, Stewart, Fineday, Leonard Butcher and Harold Brown were arrested for shining or otherwise illegally taking deer, gross misdemeanors.

[3] The White Earth Reservation was created by treaty with the Chippewa in 1867, 16 Stat. 719, II Kappler, Laws and Treaties [hereinafter Kappler], p. 974.

[4] Defendants Fulstrom and Clark pleaded guilty to the misdemeanor charges in county court and appealed their cases to district court. All other defendants, having been charged with gross misdemeanors, were bound over to the district court following their arrests.

was without jurisdiction to enforce its game and fish laws against enrolled members of the White Earth Tribe on all land within the 1867 boundaries of the White Earth Reservation.

Pursuant to Rule 29.03, Minnesota Rules of Criminal Procedure, the state appealed to this court.[5] Subsequently, the cases were remanded to the district court for the purpose of completing and supplementing the record. Upon remand, the parties entered into a comprehensive factual stipulation. Thereafter the state resubmitted its appeals, and by order of November 24, 1978, these appeals were reinstated. The counties of Beltrami, Cass, Clearwater, Hubbard, Koochiching, Lake of the Woods, Mahnomen, Pennington, and Polk were granted permission to file a brief as amici curiae.

The limited issue presented by these appeals is whether the state has jurisdiction to enforce its game and fish laws against enrolled members of the White Earth Band on non-Indian-owned land within the White Earth Reservation boundaries as established by treaty in 1867.[6] Pursuant to Public Law 280 (18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360), the Federal government expressly granted to the State of Minnesota, subject to certain exceptions, the authority to exercise both civil and criminal jurisdiction within "Indian country."[7]

[5] In accordance with Rule 29.03, subd. 1(2), the state sought permission to appeal from the order dismissing the misdemeanor convictions of Clark and Fulstrom. As respects the remaining defendants, the state appealed as of right pursuant to Rule 29.03, subd. 1(1).

[6] It should be emphasized that the only question presented by the instant factual situation for our review is whether the state has jurisdiction to regulate the hunting and fishing activities of defendants on the land in question. Thus, the issue of whether Indians may, as a matter of property law, enter onto privately-owned lands to hunt and/or fish is not raised by this case, and therefore we intimate no opinion as to the proper resolution of that question.

[7] Public Law 280 applies to all "Indian country" within the state of Minnesota, with the exception of the Red Lake Indian Reservation. See, 18 U.S.C.A. § 1162(a); 28 U.S.C.A. § 1360(a).

18 U.S.C.A § 1151 was enacted in 1948, and statutorily defines "Indian country" as:

> "* * * (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

18 U.S.C.A. § 1162, enacted in 1953, specifically granted to the State of Minnesota jurisdiction over criminal offenses committed within "Indian country" (except for the Red Lake Reservation). That statute provided, however, that:

> "* * * (b) nothing in this section shall * * * deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty agreement or statute with respect to *hunting, trapping or fishing or the control, licensing or regulation thereof.*" (Emphasis added.)

Defendants contend, and the district court concluded, that these statutes preclude the state from regulating the hunting and fishing activities at issue here. The state and amici counter with a twofold argument. They first claim that the various offenses for which defendants were charged did not occur within "Indian country" and thus the state's authority to legislate over activities within its jurisdiction is not limited by the exceptions set out in Public Law 280. Second, they argue that, even if "Indian country" is involved, the White

Earth Indians do not presently have hunting and fishing rights established by treaty within the area in question. After careful consideration we are persuaded that defendants and the district court are correct in their analysis of the various authorities, and thus we agree with defendants' claim.

The parties have stipulated that all of the violations in question occurred on land not owned by or for the Minnesota Chippewa Tribe, the White Earth Band, or an individual Indian. Accordingly, the land involved here is "Indian country" only if it lies within the limits of an Indian reservation. It is undisputed that this land is located within the boundaries of the White Earth Reservation as created by the Treaty of 1867.[8] However, the state and amici argue that this area is no longer "Indian country" as defined by 18 U.S.C.A. § 1151 (a) because the White Earth Reservation was disestablished by the Nelson Allotment Act of 1889, 25 Stat. 642.[9] Since we find our holding in State v. Forge, 262 N.W. 2d 341 (Minn. 1977), appeal dismissed, 435 U.S. 919, 98 S. Ct. 1479, 55 L. ed. 2d 512 (1978), to be controlling, we must reject this claim.

The Nelson Act was promulgated in 1889 and named after its chief proponent, Representative Knute Nelson. This legislation was one of a series of allotment acts passed by Congress after the passage of the General Allotment, or Dawes, Act of 1887, 24 Stat. 388.[10] The Nelson Act provided for the establishment of a commission (known as the Rice Commission) to negotiate with the Chippewa "for the complete ces-

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[8] As described in Article II of the Treaty of 1867, (see n. 3, *supra*) the White Earth Reservation was to contain 36 townships of land in a square form. As surveyed, it consisted of Townships 141 through 146 North, Ranges 37 through 42 West, 5th Principal Meridian. The parties have stipulated that this amounts to approximately 854,741 acres, 55,979 of which are meandered bodies of water.

[9] See, I Kappler, p. 301.

[10] See, I Kappler, p. 33.

sion and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake[11] Reservations * * *." The act was designed to concentrate Minnesota's Chippewa Indian population (except the Red Lake Band) on the White Earth Reservation and open up the other Chippewa reservations to white settlement.[12] See, generally, 4 Folwell, History of Minnesota, pp. 219-35. As respects the White Earth Reservation, the act provided that the commissioners were to negotiate for the cession of so much of the reservation "* * * as in the judgment of said commission is not required to make and fill allotments required by this and existing acts * * *." On July 29, 1889, two-thirds of the adult male Indians of the White Earth Reservation agreed with the Rice Commission to accept their individual allotments in accordance with the Nelson Act.[13] The parties have stipulated that 95 percent of the remaining 796,672 acres of reservation was eventually allotted to individual Indians.

It is well settled that simply opening up a reservation to white settlement does not terminate its status as a reservation. DeCoteau v. District County Court, 420 U.S. 425, 444,

[11] In addition to its provision relating to the White Earth Reservation, the Nelson Act authorized the commissioners to negotiate with the Red Lake Band of Chippewa for the sale of some of its land to the government. Eventually, pursuant to these negotiations, 2.4 million acres of the Red Lake Reservation were ceded to the United States. See, United States v. Minnesota, 466 F. Supp. 1382, 1384 (D. Minn. 1979).

[12] As explained in State v. Forge, *supra*, this goal of concentrating the Chippewa never came about, and by 1890 only 775 Indians out of a total population of 4,000 had moved to the White Earth Reservation. 262 N. W. 2d 346, n. 18.

[13] Also pursuant to the Nelson Act, the Indians ceded outright four townships containing valuable pine preserves to the United States. Our decision in this case applies only to land lying within the 32 townships of the White Earth Indian Reservation remaining after the 1889 cession. The other four indicated townships are therefore not significant to this decision.

95 S. Ct. 1082, 1093, 43 L. ed. 2d 300, 314 (1975). Rather, disestablishment of an Indian reservation requires a clear congressional intent to that effect. State v. Forge, *supra*; Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. ed. 2d 660 (1977); DeCoteau v. District County Court, *supra*; Mattz v. Arnett, 412 U. S. 481, 93 S. Ct. 2245, 37 L. ed. 2d 92 (1973); Seymour v. Superintendent, 368 U. S. 351, 82 S. Ct. 424, 7 L. ed. 2d 346 (1962). In State v. Forge, *supra*, we recently held that this congressional intent to terminate is lacking from the Nelson Act. 262 N. W. 2d 346.

In Forge, it was argued that the Nelson Act had disestablished the Leech Lake Indian Reservation. We rejected that contention by reasoning that Congress had not clearly manifested an intention to disestablish the Leech Lake Reservation and, accordingly, in the absence of such an express statement of congressional intent the issue must be resolved in favor of the Indians. As we stated:

> "Although the disestablishment effect of the Nelson Act is not free from doubt, we are convinced after a review of the voluminous authorities cited to us that the act did not terminate the Leech Lake Reservation.
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> * * * * *
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> "* * * to the extent the Nelson Act is unclear in expressing congressional intent to terminate the Leech Lake Reservation, this ambiguity should not be resolved to the prejudice of the Indians. As has been repeatedly recognized by the United States Supreme Court, 'statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89, 39 S. Ct. 40, 42, 63 L. Ed 138, 141 (1918). Accord, Bryan v. Itasca

County, Minnesota, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); Antoine v. Washington, 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975). This canon of construction is reflective of the fact that treaties and statutes are 'not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted.' United States v Winans, 198 U.S. 371 381, 25 S. Ct. 662, 664, 49 L. Ed. 1089, 1092 (1905). Had Congress intended to terminate completely the Leech Lake Reservation and the right of the Chippewa to fish thereon, we believe that it could have, and would have, expressed this intention with more definiteness and, in all likelihood, would not have permitted the Band, by § 3 of the Nelson Act, to continue to settle within the boundaries of the reservation." 262 N. W. 2d 346 (footnotes omitted).

Similarly, in his opinion in Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1004 (D. Minn. 1971), Judge Devitt persuasively reasoned that:

> "It is apparent in light of events before and after the passage of the Nelson Act that its purpose was not to terminate the [Leech Lake] reservation or end federal responsibility for the Indian but rather to permit the sale of certain of his lands to homesteaders and others. The United States Supreme Court has held that it is the termination of federal responsibility and not the passing of legal land title within an area which determines whether a reservation exists in the eyes of the law. Seymour v. Superintendent, 368 U. S 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962)."

The conclusions reached in State v. Forge, *supra*, and Leech Lake Band of Chippewa Indians v. Herbst, *supra*, apply with even greater force to the disestablishment claim raised in this

case. By its terms, the Nelson Act provided that the Indians were to move from Leech Lake and other reservations to the White Earth Reservation. If this act did not terminate the reservation from which the Indians were to be removed then, *a fortiori*, it did not terminate the reservation they moved to. Indeed, the fact that Congress continued to pass statutes dealing directly with the White Earth Reservation indicates that it did not intend for it to be terminated by the Nelson Act. See, Leech Lake Band of Chippewa Indians v. Herbst, *supra*. Moreover, the record shows that the Rice Commission and the Indians entered into some discussions incident to the implementation of the Nelson Act which indicate that neither of these parties believed that the act would have the effect of disestablishing the White Earth Reservation.[14] Based on the foregoing, we conclude that the Nelson Act did not disestablish the White Earth Reservation and that, consequently, all lands within its exterior boundaries are "Indian country" as defined by 18 U.S.C.A. § 1151.

The state's contentions do not require a different conclusion. The state, as well as amici, strenuously argues that this court's holding in State v. Forge, *supra*, and the decision of the Federal district court in Leech Lake Band of Chippewa Indians v. Herbst, *supra*, have been undermined by the prin-

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[14] For instance, during the Sixth Council at White Earth, one of the Indians, Gustave Beaulieu, asked the Rice Commission, "* * * whether this reservation will remain intact, or whether this bill provides for the opening of any part of this reservation." Speaking for the commission, Mr. Rice responded that: "Now, should your present reservation be reduced; should some townships be taken off, that land will have the same status as the land just ceded at Red Lake. We are distinctly of the opinion that for your own safety and protection you should part with a small portion of this reservation. Power is given us under the act to reduce it if we see fit, but we are not going to exercise any power that would be injurious to you." H. Exec. Doc. No. 247, 51st Cong., 1st Sess. 1890) (the "Rice Report"), at 96.

ciples announced by the United States Supreme Court in Rosebud Sioux Tribe v. Kneip, *supra*, and DeCoteau v. District County Court, *supra*. Rosebud and DeCoteau are the most recent of four Supreme Court opinions beginning with Seymour v. Superintendent, *supra*, and Mattz v. Arnett, *supra*, dealing with the issue of disestablishment of an Indian reservation. Contrary to the state's contention, all four cases are consistent in their approach to the disestablishment question. Each of the four decisions agrees that the standard to be applied in resolving the disestablishment issue is whether a clear congressional intent to terminate the reservation is discernible either from the face of the act, the surrounding circumstances, or the act's legislative history. Rosebud Sioux Tribe v. Kneip, *supra*, 430 U.S. 587, 97 S. Ct. 1363, 51 L. ed. 2d 665; DeCoteau v. District County Court, *supra*, 420 U.S. 444, 95 S. Ct. 1093, 43 L. ed. 2d 314; Mattz v. Arnett, *supra*, 412 U.S. 505, 93 S. Ct. 2258, 37 L. ed. 2d 106; Seymour v. Superintendent, *supra*, 368 U.S. 355, 82 S. Ct. 427, 7 L. ed. 2d 349. In accordance with these cases, this is precisely the standard we applied to the disestablishment claim in State v. Forge, *supra*. Further, to the extent that the state relies upon DeCoteau, it should be pointed out that DeCoteau was decided some two years prior to this court's decision in State v. Forge, *supra*, was briefed by the parties there, and although not cited therein, was of course considered by the court in its resolution of the disestablishment question.

In any event, we cannot agree with the state that DeCoteau is indistinguishable and controlling here. In DeCoteau, the Supreme Court concluded that South Dakota's Lake Traverse Reservation was disestablished by an 1891 act which ratified an agreement reached with the Sisseton-Wahpeton Indians in 1889, wherein they agreed to cede all unallotted lands on

the reservation to the United States for a sum certain. The most significant distinction between DeCoteau and the present case lies in the differing understandings of the Lake Traverse and the White Earth Indians. In DeCoteau, the Court cited a newspaper account of the 1889 negotiations reporting that the Sisseton-Wahpeton Indians had stated, "We never thought to keep this reservation for our lifetime." 420 U. S 433, 95 S. Ct. 1087, 37 L. ed. 2d 307. In sharp contrast, the defendants here have persuasively shown that the White Earth Indians desired to keep the reservation intact and understood that it would remain so except for the four townships of pine preserves ceded outright to the United States.[15] Accordingly, we believe that the two cases are markedly different from one another and thus the DeCoteau holding is not controlling in this case.

We therefore adhere to our holding in State v. Forge, *supra*, and necessarily conclude that the Nelson Act did not disestablish the White Earth Indian Reservation. Consequently, we hold that the various violations involved here, although occurring on non-Indian-owned land, nevertheless were committed within "Indian country" and thus the state's jurisdiction is limited to that specifically granted to it by Public Law 280.

As mentioned above, Public Law 280 expressly provided that the state's jurisdiction within "Indian country" did not extend to "* * * deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty agreement, or statute with respect to hunting, trapping or fishing or the control, licensing or regulation thereof." 18 U.S.C.A. § 1162(b). The state argues that

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[15] See, e. g., n. 14, *supra*.

this exception does not apply because the Indians have no hunting or fishing rights afforded by treaty or statute in the land within the White Earth Reservation. We are unpersuaded by this claim.

Although the Treaty of 1855 extinguished the Indians' aboriginal hunting or fishing rights in the area in question,[16] see, United States v. Minnesota, 466 F. Supp. 1382, 1385 (D. Minn. 1979), these rights were reacquired by the Treaties of 1864[17] and 1867[18] and have never since been extinguished. By the Treaty of 1864, the Mississippi, Pillager, and Lake Winnibigoshish Bands of Chippewa ceded to the United States six reservations reserved to them under the Treaty of 1855, see, n. 16, *supra*. In return they were granted a reservation, to be used as their "future home," located in the area of the present White Earth Reservation, but vastly exceeding its present size. Pursuant to the Treaty of 1867, the Chippewa ceded to the United States most of the land reserved to them by the Treaty of 1864, and in return received the White Earth Reservation.

The Treaty of 1867 specifically referred to agricultural pursuits but made no express reference to hunting and fishing rights. However, it is clear from the record that hunting and

[16] By the Treaty of 1855, 10 Stat. 1165, see II Kappler, p. 685, the Chippewa agreed to "* * * cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, * * *." In return, they were granted a number of reservations, none of which included any part of the present White Earth Reservation. As recognized by Judge Devitt in United States v. Minnesota, *supra*, this language of cession abrogates all aboriginal hunting and fishing rights. Nor have the Chippewa advanced a claim that they were orally promised continued hunting and fishing rights in the ceded area. See, United States v. Minnesota, *supra*. Thus, we necessarily conclude that the 1855 treaty extinguished their aboriginal hunting and fishing rights in the area in question.

[17] 13 Stat. 693, see, II Kappler, p. 862.

[18] 16 Stat. 719, see, II Kappler, p. 974.

fishing were an important part of the Chippewa's lifestyle and that the need to pursue these activities was a significant consideration in motivating them to negotiate with the government during this period of time.[19] Moreover, the record reflects that for a considerable period after 1867 the White Earth Indians relied, in large part, upon hunting and fishing for their basic sustenance. Thus, undoubtedly the Indians interpreted the 1867 treaty as granting them hunting and fishing rights within the White Earth Reservation and conducted themselves accordingly. Consistent with the fundamental rule that treaties are to be interpreted as the Indians understood them, e. g., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 47 U.S.L.W. 4978 (U. S. July 2, 1979); Choctaw Nation v. Oklahoma, 397 U. S. 620, 90 S. Ct. 1328, 25 L. ed. 2d 615 (1970), we are persuaded that, pursuant to the treaties of 1864 and 1867, the Chippewa reacquired hunting and fishing rights in the area in question.

But more important, even absent such a clear showing of the Indians' understanding, we believe that they have such

[19] Apparently there was little game or fish on the reservations reserved to the Chippewa in 1855, and this, in large part, led them to seek a new reservation. In a letter to the President of the United States which provided the impetus for the negotiation of the Treaty of 1864, Chief Hole-In-The-Day complained that the Indians lacked arable land "* * * to say nothing of game, to which, for many years, we must still look in a greater or less degree for subsistence." Chief Hole-In-The-Day wrote the president that: "* * * all these elements of comfort and content to our people; that is, good land, game, fish, rice, and sugar. Here we have neither, to any considerable extent. True, we may find a little rice and a few fish, but not sufficient for my people, not enough to save them from starvation. If a treaty were made with the Red Lake Indians, a tract of country of the best character for my people might be procured, without any outlay or expense to the government; say that strip of land lying on the Wild Rice river, between the 47° and 48° north latitude, and east of the Red river. There is every advantage of good soil, game, fish, rice, sugar, cranberries, and a healthy climate." Report of the Commissioner of Indian Affairs, October 31, 1863, at 329, 330 (Resp. App. at 3).

rights because hunting and fishing are a basic incident of reservation status. See, Menominee Tribe of Indians v. United States, 391 U. S. 404, 88 S. Ct. 1705, 20 L. ed. 2d 697 (1968); Alaska Pacific Fisheries v. United States, 248 U. S. 78, 39 S. Ct. 40, 63 L. ed. 138 (1918); United States v. White, 508 F. 2d 453 (8 Cir. 1974); Kimball v. Callahan, 493 F. 2d 564 (9 Cir. 1974), cert. denied, 419 U.S. 1019, 95 S. Ct. 491, 42 L. ed. 2d 292 (1975). Certainly it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to grant them a home. Accordingly, we hold that the defendants have hunting and fishing rights afforded by treaty within the area in question.

We note that, even though we hold that the state is without jurisdiction to regulate defendants' hunting and fishing activities within the White Earth Reservation, their activities will not go unregulated. Like the Leech Lake Band, the White Earth Indians have adopted a comprehensive conservation code to regulate Indian hunting and fishing within the reservation. This code declares hunting and fishing seasons, sets limits, regulates the use of firearms and other hunting equipment, and is similar to state fish and game laws in other respects. Had this code been in effect at the time the alleged violations occurred, it would have prohibited at least some, if not all, of these activities.

Affirmed.

TODD, Justice (concurring specially).

I concur in the result as applicable to the State of Minnesota in its sovereign capacity. The relationship of the rights vested in tribal members by this opinion and the rights of private property owners who have title traceable to patents granted by the United States Government is not presented in this case. I have doubt that such private property rights can be affected

where there was no specific grant of hunting and fishing rights in the Treaty of 1867, and thus no notice to persons acquiring title to property now possibly being subject to rights vested by this opinion.

YETKA, Justice (concurring specially).

I join in the special concurrence of Mr. Justice Todd.

PETERSON, Justice (concurring specially).

I join in the opinion of Mr. Justice Todd.

OTIS, Justice (concurring specially).

I join in the concurring opinion of Mr. Justice Todd.

MR. JUSTICE KELLY took no part in the consideration or decision of this case.

APPENDIX B

OPINION OF THE DISTRICT COURT OF BECKER COUNTY, SEVENTH JUDICIAL DISTRICT, STATE OF MINNESOTA (NOT PUBLISHED)

(Caption)

ORDER ON MOTIONS TO DISMISS

Defendants are enrolled members of the Minnesota Chippewa Tribe, being members of the White Earth Reservation Band of Chippewa Indians. Each defendant lives within the exterior boundaries of the White Earth Indian Reservation as created by the Treaty of 1867. Defendants are charged with violations of Minnesota statutes regulating the taking of game and fish.

The alleged conduct occurred in Becker County on lands not held in trust but within the exterior boundaries of the White Earth Indian Reservation.

Bernard Clark and Jack Fulstrom are charged with taking fish out of season, and Jack Fulstrom with having in possession a spear capable of taking fish, on April 29, 1972.

Edward Jack Larson, Marvin Joseph French, Harold Owen Annette, Alvin Francis Gjustrum, and Gary Allen Stewart, are charged with using a spotlight for taking wild animals, on October 10, 1973.

Albert LeRoy Brunner, Lester Dean Fineday, and Leonard Eugene Butcher, are charged with transporting a deer taken in violation of law, on July 20, 1974.

Harold Brown, Leonard Butcher, and Walter Butcher, are charged with using a spotlight for taking wild animals on October 10, 1976.

Defendants move to dismiss the prosecutions on the ground that the court does not have jurisdiction of the subject matter.

Mr. John E. Pearson, County Attorney, for the state. Mr. Peter W. Cannon for defendants.

On the arguments, and the files, records and proceedings,

IT IS ORDERED: In each case the motion to dismiss is granted.

Dated May 20, 1977

CHARLES W. KENNEDY
Judge of District Court

Memorandum

18 U. S. C. A. Sec 1162 provides that "Each of the States * * * listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State * * * to the same extent that such State * * * has jurisdiction over offenses committed elsewhere within the State * * * and the criminal laws of such State * * * shall have the same force and effect within such Indian country as they have elsewhere within the State * * *:

State * * *	Indian country affected
* * *	

Minnesota	All Indian country within the State, except the Red Lake Reservation * * *"

Paragraph (b) of that statute provides:

"Nothing in this section * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

The question seems to be whether Indians have a right to hunt and fish on the reservation, "afforded under Federal treaty."

The state contends that the Chippewas had no "pre-1867 rights in the area * * *." But that is at odds with the view of the United States District Court as set out in Leech Lake Band of Chippewa Indians v. Herbst, U.S.D.C., D. Minn. Third Division, 334 F. Supp. 1001 (1971) at 1004:

> "We start with the undisputed premise that at the time of the passage of the Nelson Act in 1889, the Indians possessed unrestricted hunting and fishing rights on the reservation. These rights, while perhaps in fact dating back many years to an aboriginal right were established in law by treaty with the United States in 1855, 1864 and 1867."

Dictum in State v. Cooney, 77 Minn. 518, 80 N. W. 696, decided in 1899, is to the effect that the right of tribal Indians on the White Earth Reservation to hunt and fish on the reservation "notwithstanding that the state laws prohibit such fishing and hunting" is based, in part at least, on treaty. "* * * (T)he jurisdiction of the state authorities * * * is not so extensive as to enable the state authorities to * * * destroy the effect of the treaties of the United States govern-

ment with the Indians." The syllabus reads: "* * * the tribal Indians on the reservation have, under their treaties with the United States, and the acquiescence of the state * * * a license to hunt and fish on the reservation * * *."

It has been the view of the Minnesota Supreme Court that a treaty is "not a grant of rights to the Indians, but a grant of rights from them— * * *." State v. Jackson, 218 Minn. 429, 432, 16 N. W. 2d 752 (1944). 39 Minnesota Law Review 853, at 869, says: "If the argument is sound that the treaties are only grants of rights from the Indians to the Federal Government and such rights remain in the Indians unless granted away, it would seem that Public Law 280 cannot affect Indian fish and game rights, even though the language appears to make special provision for such tribes only if their treaties reserved such rights."

See: State v. Angus Clark, District Court Mahnomen County, Ninth Judicial District, Minnesota, January 21, 1972

There is no clear showing of congressional intent to terminate the White Earth Reservation. "The congressional intent must be clear * * *." DeCoteau v. District County Court for Tenth Jud. Dist., 420 U. S. 425, 445, 95 S. Ct. 1082, 1093 (1975).

APPENDIX C
DENIAL OF REHEARING

(Caption)

October 1, 1979

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
JOHN McCARTHY
Clerk, Supreme Court

APPENDIX D
STAY OF EXECUTION OF JUDGMENT

(Caption)

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that upon the motion of the State of Minnesota, the execution of judgment is stayed for a period of 90 days from its final entry to allow the petitioner to apply to the United States Supreme Court for a writ of certiorari. Thereafter, any requests for additional extensions of the stay should be directed to the United States Supreme Court.

Dated: 11-2-79

By the Court:
ROBERT J. SHERAN
Chief Justice

APPENDIX E

NELSON ACT, 25 STAT. 642, I KAPPLER 301

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands of tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: *Provided further,* That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall

not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

Sec. 2. That the said commissioners shall, before entering upon the discharge of their duties, each give a bond to the United States in the sum of ten thousand dollars, with sufficient sureties, to be approved by the Secretary of the Interior, and conditioned for the faithful discharge of their duties under this act, and they shall also each take an oath to support the Constitution of the United States, and to faithfully discharge the duties of their office, which bonds and oaths shall be filed with the Secretary of the Interior. Said commissioners shall be entitled to a compensation of ten dollars per day for

each day actually employed in the discharge of their duties, and for their actual traveling expenses and board, not exceeding three dollars per day. Said commissioners shall also be authorized to employ a competent interpreter while engaged in the performance of their duties, at a compensation and allowance to be fixed by them, not in excess of that allowed to each of them under this act.

Sec. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however*, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further*, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives

at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

Sec. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field-notes, and plats thereof filed in the General Land Office, and duly approved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally made a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this act shall be termed "pine lands," the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot or tract, the amount of such pine timber to be estimated by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all such pine lands, describing each forty-acre lot or tract thereof separately, and opposite each such description he shall place the actual cash

value of the same, according to his best judgment and information, but such valuation shall not be at a rate of less than three dollars per thousand feet, board measure of the pine timber thereon, and thereupon such lists of lands so appraised shall be transmitted to the Secretary of the Interior for approval, modification, or rejection, as he may deem proper. If the appraisals are rejected as a whole then the Secretary of the Interior shall substitute a new appraisal and the same or original list as approved or modified shall be filed with the Commissioner of the General Land Office as the appraisal of said lands, and as constituting the minimum price for which said lands may be sold, as hereinafter provided, but in no event shall said pine lands be appraised at a rate of less than three dollars per thousand feet board measure of the pine timber thereon. Duplicate lists of said lands as appraised, together with copies of the field-notes, surveys, and minutes of examinations shall be filed and kept in the office of the register of the land office of the district within which said lands may be situated, and copies of said lists with the appraisals shall be furnished to any person desiring the same upon application to the Commissioner of the General Land Office or to the register of said local land office.

The compensation of the examiners so provided for in this section shall be fixed by the Secretary of the Interior, but in no event shall exceed the sum of six dollars per day for each person so employed, including all expenses.

All other lands acquired from the said Indians on said reservations other than pine lands are for the purposes of this act termed "agricultural lands."

Sec. 5. That after the survey, examination, and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following

manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth, and Crookston, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston, Massachusetts, of the sale of said lands at public auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

Sec. 6 That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of

entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance and if found regular and valid, patents shall issue thereon: *Provided*, That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act

Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares

to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the same period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: *Provided*, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three mil-

lion dollars the United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder.

Sec. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed.

Approved January 14, 1889.

APPENDIX F

AGREEMENT WITH WHITE EARTH BAND

SIGNATURE ROLLS, MISSISSIPPI CHIPPEWA INDIANS, WHITE EARTH RESERVATION, MINN.

We the undersigned, being male adult Indians over eighteen years of age of the tribes and bands of Chippewa Indians occupying and belonging to the White Earth Reservation, in the State of Minnesota, do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understanding the act of Congress approved January 14, 1889, of which the following is a copy, to wit:

[Public No. 13.]

AN ACT for the relief and civilization of the Chippewa Indians in the State of Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: *Provided further,* That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining

whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

Sec. 2. That the said commissioners shall, before entering upon the discharge of their duties, each give a bond to the United States in the sum of ten thousand dollars, with sufficient sureties, to be approved by the Secretary of the Interior, and conditioned for the faithful discharge of their duties under this act, and they shall also each take an oath to support the Constitution of the United States, and to faithfully discharge the duties of their office, which bonds and oaths shall be filed with the Secretary of the Interior. Said commissioners shall be entitled to a compensation of ten dollars per day for each day actually employed in the discharge of their duties, and for their actual traveling expenses and board, not exceeding three dollars per day. Said commissioners shall also be authorized to employ a competent interpreter

while engaged in the performance of their duties, at a compensation and allowance to be fixed by them, not in excess of that allowed to each of them under this act.

Sec. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however*, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further*, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

Sec. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field-notes, and plats thereof filed in the General Land Office, and duly approved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this act shall be termed "pine lands," the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot or tract, the amount of such pine timber to be estimated by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all such pine lands, describing each forty-acre lot or tract thereof separately, and opposite each such description he shall place the actual cash value of the same, according to his best judgment and information, but such valuation shall not be at a rate of less than three dollars per thousand feet, board measures of

the pine timber thereon, and thereupon such lists of lands so appraised shall be transmitted to the Secretary of the Interior for approval, modification, or rejection, as he may deem proper. If the appraisals are rejected as a whole then the Secretary of the Interior shall substitute a new appraisal and the same or original list as approved or modified shall be filed with the Commissioner of the General Land Office as the appraisal of said lands, and as constituting the minimum price for which said lands may be sold, as hereinafter provided, but in no event shall said pine lands be appraised at a rate of less than three dollars per thousand feet board measure of the pine timber thereon. Duplicate lists of said lands as appraised, together with copies of the field-notes, surveys, and minutes of examinations shall be filed and kept in the office of the register of the land office of the district within which said lands may be situated, and copies of said lists with the appraisals shall be furnished to any person desiring the same upon application to the Commissioner of the General Land Office or to the register of said local land office.

The compensation of the examiners so provided for in this section shall be fixed by the Secretary of the Interior, but in no event shall exceed the sum of six dollars per day for each person so employed, including all expenses.

All other lands acquired from the said Indians on said reservations other than pine lands are for the purposes of this act termed "agricultural lands."

Sec. 5. That after the survey, examination, and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation pub-

lished in Minneapolis, St. Paul, Duluth, and Crookston, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston, Massachusetts, of the sale of said lands at public auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

Sec. 6. That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a

homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption, or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon: *Provided*, That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act.

Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of

said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: *Provided*, That Congress may, in its discretion, from time to time during the said period of fifty years, appropriate for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as the permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the said United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder.

Sec. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed.

Approved, January 14, 1889.

And after such explanation and understanding have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof, and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said White Earth Reservation as is not embraced in the following described boundaries, to wit:

Townships 141 and 142, of range 37; townships 141, 142, 143, 144, 145 and 146, of range 38; townships 141, 142, 143, 144, 145, and 146, of range 39; townships 141, 142, 143, 144, 145, and 146, of range 40; townships 141, 142, 143, 144, 145, and 146, of range 41; and townships 141, 142, 143, 144, 145, and 146, of range 42, for the purposes and upon the terms stated in said act, which said lands, embraced within said boundaries, have been reserved by the commissioners appointed under said act and as therein authorized, for the purpose of making and filling the allotments therein provided for; and we do also hereby grant, cede, and relinquish to the United States, for the purposes and upon the terms stated in

said act, all our right, title, and interest in and to the lands reserved by us and described in the first article (ending with the words "to the place of beginning") of the treaty with the Chippewas of the Mississippi, proclaimed April 18, 1867 (16 Stat., p. 719), and also to the Executive addition thereto made and described in an executive order dated October 29, 1873; and we do also hereby cede and relinquish to the United States all our right, title, and interest in and to all and so much of the Red Lake Reservation as is not required and reserved under the provisions of said act, to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided.

Witness our hands and seals hereto subscribed and affixed, at White Earth Agency, in the State of Minnesota, this 29th day of July, 1889.

[SEAL.] HENRY M. RICE,
[SEAL.] JOSEPH B. WHITING,
Commissioners
B. P. SHEKLER,
United States Indian Agent
W. C. HUBBELL,
Secretary to Commission

WHITE EARTH CHIPPEWAS OF THE MISSISSIPPI.
[SIGNATURES OR MARKS]

APPENDIX G

18 U.S.C. § 1162 (PART OF PUBLIC LAW 280)

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of

the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Supreme Court, U. S.
FILED
JAN 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-974

STATE OF MINNESOTA,

Petitioner,

vs.

BERNARD CLARK, GARY ALLEN STEWART, JACK FULSTROM, ALBERT LeROY BRUNNER, EDWARD JACK LARSON, LESTER DEAN FINEDAY, MARVIN JOSEPH FRENCH, LEONARD EUGENE BUTCHER, HAROLD OWEN ANNETTE, HAROLD L. BROWN, ALVIN FRANCES GJUSTRUM, WALTER BUTCHER and LEONARD BUTCHER,

Respondents.

BRIEF OF BERNARD CLARK, GARY ALLEN STEWART, JACK FULSTROM, ALBERT LeROY BRUNNER, EDWARD JACK LARSON, LESTER DEAN FINEDAY, MARVIN JOSEPH FRENCH, LEONARD EUGENE BUTCHER, HAROLD OWEN ANNETTE, HAROLD L. BROWN, ALVIN FRANCES GJUSTRUM, WALTER BUTCHER and LEONARD BUTCHER, IN OPPOSITION TO PETITION FOR CERTIORARI

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Petitioner,

vs.

BERNARD CLARK, GARY ALLEN STEWART, JACK FULSTROM, ALBERT LeROY BRUNNER, EDWARD JACK LARSON, LESTER DEAN FINEDAY, MARVIN JOSEPH FRENCH, LEONARD EUGENE BUTCHER, HAROLD OWEN ANNETTE, HAROLD L. BROWN, ALVIN FRANCES GJUSTRUM, WALTER BUTCHER and LEONARD BUTCHER,

Respondents.

BRIEF OF BERNARD CLARK, GARY ALLEN STEWART, JACK FULSTROM, ALBERT LeROY BRUNNER, EDWARD JACK LARSON, LESTER DEAN FINEDAY, MARVIN JOSEPH FRENCH, LEONARD EUGENE BUTCHER, HAROLD OWEN ANNETTE, HAROLD L. BROWN, ALVIN FRANCES GJUSTRUM, WALTER BUTCHER and LEONARD BUTCHER, IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

I. Whether the State of Minnesota may regulate the hunting and fishing activities of enrolled members of the

White Earth Bank of Chippewa Indians on non-Indian owned land within the boundaries of the White Earth Reservation boundaries as established by Treaty in 1867.

STATEMENT

A lengthy and comprehensive factual stipulation and set of exhibits were agreed to by the parties and filed in court.

The Defendants, all enrolled members of the White Earth Band of Chippewas, (Stipulation, §1) one of the Bands comprising the Minnesota Chippewa Tribe, a federally-recognized Tribe (Stipulation §2) were arrested for various violations of Minnesota game and fish laws within the thirty-two townships reserved for allotments to Indians residing on the White Earth Reservation or be removed to that Reservation under the provisions of the Nelson Act. The violations occurred on non-Indian owned land. Some were on public roads and some on non-Indian land adjoining lakes or streams.

The State District Court for Becker County, Seventh Judicial District, dismissed the prosecutions on the grounds the Defendants had treaty protected rights to hunt and fish within the White Earth Reservation boundaries and the Court lacked subject matter jurisdiction.

The State of Minnesota appealed the dismissals to the Minnesota Supreme Court. The Minnesota Supreme Court affirmed the order dismissing.

Additional pertinent facts are that pursuant to the Nelson Act (25 Stat. 642) the members of the White Earth Band did "grant, cede, relinquish and convey to the United States all . . . [their] right, title and interest in and to" the four northern townships (Townships 146, 145, 144

and 143 North) in Range 37 West. The original Reservation as created by the Treaty of 1867 contained 36 townships. (Stipulation §36 and 14). None of the violations took place in the four "ceded townships".

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I.

THE DECISION OF THE MINNESOTA SUPREME COURT IS CONSISTENT AND IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT AND IT IS ALSO CONSISTENT WITH EXISTING FEDERAL POLICY.

The decision of the Minnesota Supreme Court was made after examining voluminous exhibits submitted by both sides and a comprehensive set of stipulated facts. The Counties of Beltrami, Cass, Clearwater, Hubbard, Koochiching, Lake of the Woods, Mahnomen, Pennington and Polk submitted a Brief as Amici Curiae in support of the Plaintiff-Appellant, State of Minnesota. Counsel for Amici Curiae were also allowed to make oral arguments before the Minnesota Supreme Court. The Minnesota Supreme Court by a unanimous opinion affirmed the order of the Becker County District Court dismissing the prosecution of the thirteen Chippewa Indian Defendants for violation of state game and fish laws.

The Supreme Court of Minnesota thoroughly analyzed and discussed the decisions of this Court in *DeCoteau v. District County Court*, 420 U. S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584 (1977); *Mattz v. Arnett*, 420 U. S. 444; and *Seymour v. Superintendent*, 368 U. S. 355. The Court noted the distinction between *DeCoteau* and the present case. It stated at 282 NW 2d at 908 (Petitioner's Appendix A-11) that:

> In sharp contrast, the defendants here have persuasively shown that the White Earth Indians desired to keep the reservation intact and understood that it would remain so except for the four townships of pine preserves ceded outright to the United States. Accordingly we believe the two cases are markedly different from one another and thus DeCoteau is not controlling in this case.

The Petitioners have cited the decision of the United States District Court for the District of Minnesota in *United States v. Minnesota*, 466 F. Supp. 1382 (1979) *appeal docketed*, No. 79-1420 (8th Cir., June 1, 1979) as being contrary to the Minnesota Supreme Court holding in this case. There is no such inconsistency. That case dealt with the rights to hunt and fish of the Red Lake Band of Chippewas on lands ceded by them and not reserved for allotment or reservation purposes. In contrast this case deals with lands reserved within thirty-two townships for allotment to Indians residing on or to be removed to the White Earth Reservation.

This Court has dealt with the tribal status of the Chippewas in *Chippewa Indians v. United States*, 307 U. S. 1 (1939) wherein this Court stated at page four:

> It is true that, prior to the adoption of the Act of 1889, the tribe had been broken up into numerous bands, some of which held Indian title to tracts in the State of Minnesota. The Act refers to these collectively as "The Chippewas in the State of Minnesota." Whether or not the tribal relation had been dissolved prior to it adoption, the Act contemplates future dealings with the Indians upon a tribal basis. It exhibits a purpose gradually to emancipate the Indians and to bring about a status comparable to that of citizens of the United States. But it is plain that, in the interim,

> Congress did not intend to surrender its guardianship over the Indians or treat them otherwise than as tribal Indians.
>
> This is evidenced by a series of acts, the first of which was adopted nineteen months after the Act of 1889, which are inconsistent with the view that the Congress considered the Indians as emancipated or intended to enter into a binding contract with them as individuals. Many of these statutes refer to the Chippewas of Minnesota as a tribe. Moreover, an examination of the Act of 1889 discloses that it is not cast in the form of an agreement. and, we may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians, in the absence of a clear expression of that intent.

The United States Court of Claims in *Chippewa Indians of Minn. v. U. S.*, 90 S. Cls. 140, discusses in detail the reserved portion of the White Earth Reservation and the effect on it of the Act of 1889. The Court said:

> Defendant also contends that the reserved portion of the White Earth Reservation was not ceded under the Act of 1889, or otherwise; . . . .
>
> We are of opinion that the position of the defendant is correct and that plaintiffs are not entitled to recover.

The Minnesota Supreme Court decision is in accord with applicable Federal Court decisions including those of this Court.

II.

THE ISSUES RAISED IN THIS CASE AND RULED UPON BY THE MINNESOTA SUPREME COURT ARE IN KEEPING WITH THE EXPECTATIONS OF THE WHITE EARTH INDIANS, THE UNITED STATES AND THE STATE OF MINNESOTA THAT HAVE DEVELOPED SINCE THE ENACTMENT OF THE NELSON ACT OF 1889 AND THESE ESSENTIAL RELATIONS SHOULD NOT BE DISTURBED.

The Nelson Act only applied to the State of Minnesota and the Chippewas of Minnesota. Its very terms are unique to the Chippewas of Minnesota and their reservations and its interpretation cannot be used to assist in interpretations elsewhere.

The Petitioners suggest that the interpretation of the Act will have "immense jurisdictional significance within the state. Not only are Indian hunting and fishing rights at stake, but ultimately so is general state regulatory and tax jurisdiction, and probably the issue of Indian jurisdiction over non-Indians."

Respondents suggest that the Minnesota Supreme Court recognized that this case had limited issues (see footnote 6). This case is certainly not an appropriate case to decide issues raised for the first time here and not raised before the Minnesota Supreme Court. This Court has in the past decided a tax question on the Leech Lake Reservation of the Minnesota Chippewa Tribe in the case of *Bryan v. Itasca County, Minnesota*, 426 U. S. 373 (1976). There is presently pending the consolidated cases of *United States v. Minnesota* and *White Earth Band of Chippewa Indians v. Herbst*, Civ. No. 3-74-63 and Civ. 3-74-305 in the Federal District Court for the District of Minnesota. The

Plaintiffs in these cases are seeking a declaratory judgment that the White Earth Band of Chippewas has exclusive hunting and fishing rights within the boundaries of the White Earth Reservation; and the United States in its action is seeking a declaratory judgment that the State of Minnesota has no jurisdiction over Indian hunting and fishing within the White Earth Reservation.

The issues in these cases are much broader than the narrow issues in the instant case and the Petitioner has raised the same issues in these cases that it seeks to raise in its Petition here. Respondents suggest that the pending Federal District Court case is an appropirate forum to resolve these issues and that they can be more fully developed factually in that forum than by this Court granting certiorari.

CONCLUSION

The decision of the Minnesota Supreme Court is in accordance with prior law and certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-974

STATE OF MINNESOTA,
Petitioner,

v.

BERNARD CLARK, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE OF THE COUNTIES OF BELTRAMI, CARLTON, CLEARWATER, HUBBARD, ITASCA, KOOCHICHING, LAKE OF THE WOODS, MARSHALL, PENNINGTON, POLK, RED LAKE, AND ROSEAU, MINNESOTA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 42(3), the Counties of Beltrami, Carlton, Clearwater, Hubbard, Itasca, Koochiching, Lake of the Woods, Marshall, Pennington, Polk, Red Lake, and Roseau, Minnesota, move that the Court grant leave to file the attached brief amici curiae in support of the Petition for Writ of Certiorari in the above-captioned case. The Petitioner has consented to the filing of this brief, but the Respondents have refused to give their consent.

With the right to hunt and fish free of State regulation as the focal point, the primary issue involved in this case is whether the White Earth Reservation, as established by the Treaty of March 19,

1867, 16 Stat. 719, was disestablished by the Act of January 14, 1889, 25 Stat. 642, the so-called "Nelson Act". Because all of Mahnomen County and a significant portion of Clearwater County is located within the boundaries of the 1867 Reservation, this case is of particular importance to both these Counties.[1] In addition, a ruling as to the effect of the Nelson Act on the 1867 White Earth Reservation will necessarily have an impact on the other historic reservations that were affected by that Act. Since approximately two-thirds of the Red Lake Reservation (as established by the Treaty of October 2, 1863, 13 Stat. 667), essentially all of what was known as the Greater Leech Lake Reservation,[2] the Fond du Lac Reservation (as established by the Treaty of September 30, 1854, 10 Stat. 1109), the Bois Fort (Nett Lake) Reservation (as established by the Treaty of April 7, 1866, 14 Stat. 765), and the Deer Creek Reservation (as established by Executive Order of June 30, 1883), were ceded pursuant to the Nelson Act, this case is also of great importance to the other Amici Counties. The 1863 Red Lake Reservation encompasses a significant portion of the Counties of Beltrami, Koochiching, Lake of the Woods, Pennington, and Polk; the greater Leech Lake Reservation encompasses a significant portion of the Counties of Hubbard, Cass, and Itasca; the 1854 Fond du Lac

[1] A significant portion of a third county, Becker County, is also located within the 1867 Reservation. Because the State of Minnesota is acting on behalf of Becker County in this case (see Petition at 6), that County will not be participating as Amicus here.

[2] The Greater Leech Lake Reservation includes the historic Leech Lake, Lake Winnebagoshish, Cass Lake, and White Oak Point Reservations, as established by the Treaty of February 22, 1855, 10 Stat. 1165, and subsequently modified by the Treaties of May 7, 1864, 13 Stat. 693, and March 19, 1867, *supra*.

Reservation encompasses a significant portion of the Counties of Carlton and St. Louis;[3] the 1866 Bois Fort (Nett Lake) Reservation encompasses a significant portion of the Counties of Koochiching and St. Louis; and the 1883 Deer Creek Reservation encompasses a significant portion of Itasca County.

It is important to note that the significance of this case to the Amici Counties goes far beyond the issue of State regulation of Indian hunting and fishing activities on non-trust lands within the confines of the historic reservations involved. Thus, a ruling that the Nelson Act did not disestablish the 1867 White Earth Reservation and the other historic reservation areas affected by that Act will deprive both the State and the Amici Counties of a significant amount of governmental authority which they have heretofore exercised over those lands. That is, because the decision of the Minnesota Court could be read to require that all the historic reservations affected by the Nelson Act be considered to presently exist,[4] that decision, if permitted to stand, will present serious and difficult jurisdictional problems, beyond hunting and fishing, to the State and its local governments within those reservation areas, even

[3] The County of St. Louis did not have an opportunity to fully examine the merits of the issues presented prior to the printing of this Motion. The Office of the Clerk will be advised directly if the County elects to join in the views expressed herein.

[4] As noted by the State (*see* Petition at 9), the Minnesota Supreme Court in this case expressly reaffirmed the conclusion it had reached in an earlier case involving the historic Leech Lake Reservation (*State* v. *Forge*, 262 N.W. 2d 341 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978)), that "congressional intent to terminate [reservation status] is lacking from the Nelson Act...." *State* v. *Clark*, 282 N.W. 2d 902, 906 (Minn. 1979) (citations omitted).

with the application of Public Law 280.[5] In short, the ruling of the State Supreme Court in this case, if permitted to stand, could well lead to significant limitations upon the State's and the Amici Counties' regulatory and taxing authority within the historic reservation areas involved.

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[5] Public Law 280 was automatically extended to all Indian Country within Minnesota, except the Red Lake Reservation. *See* 18 U.S.C. § 1162; 28 U.S.C. § 1360. Public Law 280, however, does not encompass the taxing or regulatory authority of the State and local governments. *See, e.g., Bryan* v. *Itasca County, Minnesota*, 426 U.S. 373 (1976); *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 661-63 (9th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Moreover, State and local regulation of existing hunting and fishing rights is expressly exempted from coverage under Public Law 280. 18 U.S.C. § 1162(b). Importantly, because Public Law 280 does not apply to the Red Lake Reservation, the jurisdictional implications for the area of that historic reservation affected by the Nelson Act will include civil and criminal jurisdiction as well.

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BRIEF AMICI CURIAE OF THE COUNTIES OF BELTRAMI, CARLTON, CLEARWATER, HUBBARD, ITASCA, KOOCHICHING, LAKE OF THE WOODS, MARSHALL, PENNINGTON, POLK, RED LAKE, AND ROSEAU, MINNESOTA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

The interest of the Amici Counties is fully set forth in the foregoing motion.

STATEMENT OF THE CASE

The Amici Curiae adopt the Statement of the Case set forth in the Petition for Writ of Certiorari.

ARGUMENT

Introduction

In recent years, this Court has twice confronted the question of the disestablishment of Indian reservations, and has set forth in detail the proper judicial approach to such questions. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977) and *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). In both cases, the Court concluded that the reservation areas involved in these cases had been disestablished by Acts of Congress enacted in the late nineteenth and early twentieth centuries.

Nevertheless, the Minnesota Supreme Court, while professing to follow the principles expressed in *DeCoteau* and *Rosebud*, in effect disregarded those decisions by holding, in spite of clear congressional intent to the contrary, that the White Earth Reservation had not been disestablished by the Nelson Act. *See State* v. *Clark*, 282 N.W.2d 902 (Minn. 1979). The Minnesota court consequently ruled that the State lacked jurisdiction over hunting and fishing by Indians within the 1867 Reservation boundaries.[1] In so ruling, the Minnesota Supreme Court failed to adequately consider the various factors which constitute the analysis mandated by this Court and improperly ignored the manifest intent of Congress to disestablish the White Earth Reservation.

[1] This ruling apparently did not apply to the four townships which were ceded pursuant to the Nelson Act. *See State* v. *Clark*, 282 N.W. 2d 902, 906 n.13 (Minn. 1979).

I. THE DECISION OF THE SUPREME COURT OF MINNESOTA INCORRECTLY DISREGARDS CONGRESSIONAL INTENT TO DISESTABLISH THE WHITE EARTH RESERVATION.

It is well settled that in determining questions of the disestablishment of Indian reservations or portions thereof by congressional action, the intent of Congress controls. *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425, 442, 444 (1975). As discussed in greater detail *infra*, the Minnesota court failed to use the approach mandated by this Court in its treatment of the disestablishment issue. A complete analysis of the relevant material, on the other hand, leads to the unavoidable conclusion that the underlying purpose of the Nelson Act was the disestablishment of the White Earth Reservation.

The Nelson Act provided for the appointment of a commission to negotiate with the various Chippewa bands for the cession of their reservations to the United States. With particular regard to the White Earth Reservation, Section 1 of the Act provided that the commission negotiate with the bands for

> the complete cession and relinquishment in writing of all their title and interest . . . to all and so much of [the Red Lake and White Earth] reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts. . . .

The Act further provided that the "acceptance and approval of such cession and relinquishment by the

President . . . shall operate as a complete extinguishment of the Indian title. . . . ." As this Court has held, this type of cession language is "precisely suited" to effect disestablishment. *Rosebud*, *supra* at 597; *DeCoteau*, *supra* at 445.

Following its enactment, the Nelson Act scheme was presented to the White Earth Band, which, after some negotiation, accepted the proposed cession. An agreement was then entered into whereby the Band ceded all interest in four of the townships of the Reservation and the remaining thirty-two townships were designated as the land from which allotments would be made pursuant to the Act. H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1890). The Band thus accepted the terms of the Act, and the underlying purpose of disestablishment embodied in the Nelson Act was thereby carried into effect.

The legislative history of the Nelson Act, which is accurately summarized by the State, Petition at 10-12, clearly indicates that the Act was intended to disestablish the reservations involved, to allot parcels of land to individual Indians, and to open the remainder to non-Indian settlement. That this was the prevailing perception of the Act at the time it was passed is confirmed not only by the relevant committee reports, but also by a letter of the Commissioner of Indian Affairs to the Secretary of the Interior dated March 6, 1888. *See* Brief of Amici Curiae, Appendix F at 225a-33a, *State* v. *Clark*, 282 N.W.2d 902 (Minn. 1979). In that letter, the Commissioner voiced objections to the proposed legislation on several grounds, one of which was that the measure would terminate the reservation status of the

White Earth Reservation. This letter reflects the contemporaneous understanding of the officer charged with the execution of the statute and as such is entitled to considerable weight. *See Zuber* v. *Allen*, 396 U.S. 168, 192 (1969). *Cf. Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. at 602-03 (presidential proclamation).

The circumstances surrounding the passage of the Nelson Act eliminate any doubt as to its intended effect. The prevailing federal Indian policy of the era in which the Act was passed was essentially twofold: civilization of the Indian population and reduction of existing Indian reservations. As delineated in the Annual Reports of the Secretary of the Interior and the Commissioner of Indian Affairs during this period, civilization of the Indians was to be accomplished primarily by education, allotment of lands in severalty, and destruction of tribal relations. *See, e.g.*, [1885] Sec'y Interior Ann. Rep. 25-28; [1890] Com. Ind. Affairs Ann. Rep. VI, XXXIX; [1891] Com. Ind. Affairs Ann. Rep. 3-9. At the same time, it was the policy of the federal government to reduce the amount of existing Indian reservation lands in order to make the surplus lands—that is, the lands not needed by the Indians themselves—available for non-Indian settlement. *See, e.g.*, [1890] Com. Ind. Affairs Ann. Rep. VI, XXXVII-XXXIX; [1891] Com. Ind. Affairs Ann. Rep. 8, 44-47. Although this policy has since fallen into disfavor, it was nevertheless in force at the time of the passage of the Nelson Act and thus is of utmost significance in determining the question of congressional intent.

Against this background, it is clear that the underlying purpose of the Nelson Act was the dis-

establishment of the various reservations affected. Both this Court and the Court of Claims have stated that the Act was enacted in furtherance of the federal Indian policy summarized above. *See Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 208-09 (1930); *Chippewa Indians of Minnesota* v. *United States*, 88 Ct.Cl. 1, 26 (1938, supp. op. 1939), *aff'd*, 307 U.S. 1 (1939). The retention of reservation status is simply incompatible with the objectives of the destruction of tribal relations and the assimilation of the Indian into non-Indian society. The radical departure from this policy suggested by the Minnesota Supreme Court is inconceivable in the absence of any supporting legislative history.

In furtherance of this prevailing policy, Congress in 1887 passed the General Allotment Act, Act of February 8, 1887, 24 Stat. 388 (the so-called Dawes Act), which provided for individual allotments and the disposal of surplus lands. Following the passage of the General Allotment Act, the opening of reservation lands occurred much more rapidly than before. *See, e.g.*, [1892] Sec'y Interior Ann. Rep. VII, XXXIII. Certain of the surplus land acts disposed of only a particularly described portion of the surplus lands, and effected a cession of that portion, with the remainder becoming a "diminished" reservation. *See, e.g.*, Act of March 3, 1891, 26 Stat. 989, 1016, 1018, 1026, 1029, 1032, 1039; Act of April 23, 1904, 33 Stat. 254. *See also Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. at 586-87; *DeCoteau* v. *District County Court*, 420 U.S. at 439, 446. Other surplus land statutes, however, disposed of *all* lands not needed for allotments. *See, e.g.*, Act of March 3, 1891, 26 Stat. 909, 1022, 1035; Act of June 6, 1900, 31 Stat. 676. In these instances, the

reservations were disestablished by the statutes. *See, e.g., DeCoteau*, 420 U.S. at 439, 445-47; *Ellis* v. *Page*, 351 F.2d 250, 251-52 (10th Cir. 1965); *Tooisgah* v. *United States*, 186 F.2d 93, 97-98 (10th Cir. 1950).

It is clear that the Nelson Act falls in the latter category, and the White Earth Reservation was therefore disestablished, not diminished. Section 1 of the Act provided for the "complete cession and relinquishment" of all title and interest to "all and so much" of the White Earth Reservation "as in the judgment of the said commission is not required to make and fill the allotments required by this and existing acts." There was therefore to be no remaining diminished reservation but a complete cession of all land not needed for allotments. In this respect, the Nelson Act is very similar to the 1891 cession act interpreted in *DeCoteau* v. *District County Court, supra*, which provided, in relevant part, as follows:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby *cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments* provided for in article four of this agreement shall have been made.

Act of March 3, 1891, 26 Stat. 1035 (emphasis added). This language, which is identical in substance to the corresponding language in the Nelson Act, was held by this Court in DeCoteau to be "precisely suited" to disestablishment. 420 U.S. at 445-46.

In part because the Indians from the other reservations (except Red Lake) were to be removed to White Earth for the purpose of making allotments, the Commissioners appointed under the Nelson Act to negotiate with the Chippewas determined that a major part of the White Earth Reservation would be required for allotments, and therefore drew up a cession agreement which provided for the cession of four specified townships. The fact that the Commissioners reserved a contiguous area for allotments does not, however, support the conclusion that the Reservation was diminished rather than disestablished. Neither the Commissioners nor the Indians could alter the clear intent of Congress to cede all surplus lands and disestablish the Reservation. As the State has ably argued in its Petition, at 12-13, the proposal made to the Indians was not open to negotiation of its terms but could only be accepted or refused. All indications from the transcript of the negotiations are that the Indians, before entering into the agreement, understood the import of the proposed cession. *See* H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1890). Even if the Commissioners or the Indians had desired the retention of a diminished reservation, they could not have done so under the mandate given by Congress in Section 1 of the Nelson Act. Therefore, the cession provided for in the agreement can only be the same as that called for in the Act—that is, the complete cession of all lands not necessary for allotments.[2] With the subsequent Presi-

[2] In light of the language of the Nelson Act, this argument would be of equal applicability to the Red Lake Reservation. This need not be confronted, however, since the unceded portion of the Red Lake Reservation was never allotted, *see, e.g., Chippewa Indians of Minnesota* v. *United States*, 90 Ct.Cl. 140,

(*footnote continues*)

dential approval, the Act was fully implemented and the underlying purpose of disestablishment was thereby carried into effect.

Importantly, the Respondents themselves have conceded that the Nelson Act provided for the cession of all the Reservation except that required to make allotments. Answer to Petition for Rehearing at 5, *State* v. *Clark*, 282 N.W.2d 902 (Minn. 1979). Moreover, a number of decisions of this Court have characterized the Act in a similar fashion. *See, e.g., Chippewa Indians of Minnesota* v. *United States*, 301 U.S. 358, 362 (1937); *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 208-09 (1930); *LaRoque* v. *United States*, 239 U.S. 62, 65 (1915); *United States* v. *Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 503 (1913); *Fairbanks* v. *United States*, 223 U.S. 215, 217-18 (1912). As discussed *supra*, this type of cession statute has consistently been held to have the effect of disestablishment, not diminishment.

Other judicial treatment of the Nelson Act confirms this interpretation. The United States District Court for the District of Minnesota has interpreted the purpose of the Act to have been to "restore the land to the public domain and open it to settlement by whites." *United States* v. *Minnesota*, 466 F. Supp. 1382, 1387 (D. Minn. 1979), *aff'd per curiam sub nom. Red Lake Band of Chippewa Indians* v. *Minnesota*, No.

(*footnote continued*)

144 (1940), and since the Act of February 20, 1904, 33 Stat. 46, which ceded the western portion of the area reserved by the Chippewa Commission for allotments, expressly recognized the area retained by the Red Lake Indians as the "diminished Red Lake Reservation." *See also Red Lake Band of Chippewa Indians* v. *Minnesota*, No. 79-1420 (8th Cir., January 31, 1980).

79-1420 (8th Cir., January 31, 1980). The restoration of reservation lands to the public domain is synonymous with disestablishment. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. at 589 n.5; *DeCoteau* v. *District County Court*, 420 U.S. at 426-27, 446, 448-49.

The jurisdictional history of the 1867 White Earth Reservation subsequent to passage of the Nelson Act strongly supports a conclusion that the Reservation was disestablished. The long-standing policy of the State of Minnesota to enforce the State's fish and game laws against the Indians within the Reservation except on tribal lands and allotted trust lands apparently went unchallenged by the United States until the last several years. *See* Brief of Amici Curiae at 54-56 and material cited therein, *State* v. *Clark*, 282 N.W.2d 902 (Minn. 1979). To the extent that the administrative and congressional treatment of the disputed area supports an opposite conclusion, it is of little force since it is virtually identical to that of the Lake Traverse Reservation, found to have been disestablished in *DeCoteau*. *See* Brief of Amici Curiae at 59-63, *State* v. *Clark*, *supra*.

Under *DeCoteau* and *Rosebud*, there can be no doubt as to the effect of the Nelson Act. That Act clearly disestablished the 1867 White Earth Reservation, and the decision of the Minnesota Supreme Court is therefore erroneous.

II. THE DECISION OF THE SUPREME COURT OF MINNESOTA IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

It is clear from the opinion of the Minnesota court that while it acknowledged the decisions in *DeCoteau* and *Rosebud*, it did not undertake the

methodical inquiry mandated by those decisions, but instead relied heavily on the decision in *State* v. *Forge*, 262 N.W.2d 341 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978). *State* v. *Clark*, 282 N.W.2d 902, 905-908 (Minn. 1979). An examination of the court's opinion in *Forge* reveals no indication that the court there used the approach required by *DeCoteau* and *Rosebud*. Indeed, the opinion contains no mention of those cases but only the unsupported conclusion that the Nelson Act did not disestablish the Leech Lake Reservation. 262 N.W.2d at 346. Because the Minnesota court failed to use the required approach to the issue of disestablishment of the White Earth Reservation, its conclusions regarding the effect of the Nelson Act on the White Earth Reservation are incorrectly reached and lack the necessary support.

Furthermore, the Minnesota court has disregarded the particular relevance of this Court's decision in *DeCoteau*, which involved circumstances so similar as to be controlling here. While *DeCoteau* involved a different reservation and statute, the conclusions reached by the Court apply with equal strength to the 1867 White Earth Reservation, and there are no significant grounds for distinguishing *DeCoteau* and arriving at a different result in the instant case.

The only distinction drawn by the Minnesota court between the instant case and *DeCoteau* is its poorly substantiated assertion that the White Earth Band desired to keep their reservation intact except for the four ceded townships. *See State* v. *Clark*, 282 N.W. 2d at 908. Contrary to the court's conclusion, it

is unclear exactly what was desired by a majority of the Band. What is clear from the transcript is that the Indians understood and agreed to the terms of the Act—that is, that the four surplus townships would be sold and that the Indians would receive individual allotments on the remainder.[3]

Ideally, the *Rosebud* and *DeCoteau* decisions should have settled the law regarding this recurring problem of reservation status. Nevertheless, confusion and contradiction persist. The Eighth Circuit, for example, has taken an inconsistent approach to the case before it, holding that some reservation areas were disestablished and others were not, without articulating clear reasons for distinguishing among them, and without adequately reconciling its decisions with those in *Rosebud* and *DeCoteau*. *Compare Red Lake Band of Chippewa Indians* v. *Minnesota*, No. 79-1420 (8th Cir., January 31, 1980) and *United States ex rel. Cook* v. *Parkinson*, 525 F. 2d 120 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977) *with United States* v. *Dupris*, No. 78-1575 (8th Cir., November 27, 1979) and *United States* v. *Long Elk*, 565 F.2d 1032 (8th Cir. 1977). *Cf. United States* v. *Dupris*, No. 78-1575 (8th Cir., November 27, 1979) (McMillian, J., dissenting); *Stankey* v. *Waddell*, 256 N.W. 2d 117 (S.D. 1977) (state court, following *Rosebud* and *DeCoteau*, reaches conclusion opposite to that in *Dupris*, regarding same reservation). It has therefor become necessary that this Court definitively restate and clarify the law applicable to questions of reservation status, so as to eliminate confusion and put an end to the inconsistent and often incorrect interpretations of this Court's decisions.

[3] Since the negotiations followed the passage of the cession act, unlike the negotiations in *DeCoteau*, they are of very limited utility in determining congressional intent.

Nowhere is this problem more evident than in the instant case. By disregarding unmistakable indications of congressional intent, and by failing to use the analysis required for cases of this kind, the Minnesota Supreme Court has done violence to the principles expressed by the Court in *Rosebud* and *DeCoteau*. This error is in need of correction because of the far-reaching implications of this case, which bear not only on the jurisdiction of the State and Counties over the area involved in this case, but also on jurisdictional questions on other reservations both within and without the State of Minnesota.

III. THE DECISION OF THE SUPREME COURT OF MINNESOTA IS INCONSISTENT WITH THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN *RED LAKE BAND OF CHIPPEWA INDIANS* v. *MINNESOTA*.

On January 31, 1980, while this brief was being prepared, the United States Court of Appeals for the Eighth Circuit rendered a decision in *Red Lake Band of Chippewa Indians* v. *Minnesota*, No. 79-1420 (8th Cir., January 31, 1980). While the timing of the decision made it impossible to adequately incorporate this decision into the foregoing discussion, the ruling is nevertheless of utmost importance and merits separate treatment because it is in direct conflict with the decision of the Minnesota Supreme Court in the case at hand.

In a brief *per curiam* decision, the Eighth Circuit in *Red Lake* affirmed the decision of the District Court in *United States* v. *Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), and stated that the Red Lake Reservation had been diminished by the Nelson Act.

(See note 2, *supra.*) In so doing, the Eight Circuit in effect adopted the rationale of the District Court decision, which stated, *inter alia*, that the purpose of the Nelson Act was to restore the reservation area in question to the public domain. 466 F. Supp. at 1387. As noted in Section I of this brief, restoration to the public domain is synonymous with disestablishment. *See Rosebud*, 430 U.S. at 589 n.5; *DeCoteau*, 420 U.S. at 426-27, 446, 448.

The Eighth Circuit's conclusion that the Nelson Act resulted in the disestablishment of the portion of the Red Lake Reservation affected by the Act is in direct conflict with the decision of the Minnesota Supreme Court in the case at hand. This conflict between state and federal courts on an issue of this magnitude necessitates resolution by this Court.

A copy of the Eighth Circuit's decision in *Red Lake* will be forwarded to the Court as soon as it is received by counsel for the Amici Curiae.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. The matter should be scheduled for argument on the merits, or in the alternative, be remanded to the Supreme Court of Minnesota for further consideration in light of *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). *See Appawora* v. *Brough*, 431 U.S. 901 (1977).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-974

STATE OF MINNESOTA,

Petitioner,

v.

BERNARD CLARK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota

BRIEF FOR THE STATE OF SOUTH DAKOTA, *ET AL.*, AS AMICI CURIAE IN SUPPORT OF PETITION

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Certain other interested States did not have an opportunity to fully examine the merits of the question presented prior to the printing of this Brief. The Office of the Clerk will be advised directly if those States elect to join in the views expressed herein.

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The State of South Dakota and the other States joining herein have a general interest in the manner in which any question of Federal Indian Law is resolved. With respect to the instant case, the issue of reservation status is of particular importance to those States containing historic reservation areas, such as the Amici States here, since the resolution of this issue can significantly

affect the extent to which the States may exercise jurisdiction within those areas. Thus, the principles and guidelines used by the courts in resolving the question of reservation status are of paramount concern to the States joining in this Brief.

The Amici States concur in the arguments advanced by the State of Minnesota in the Petition for Writ of Certiorari, and share that State's concern that the decision of the Minnesota Supreme Court in the instant case conflicts with this Court's decisions in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977) and, if left to stand, will seriously erode the principles expressed therein. The Amici Curiae therefore support the Petition for Writ of Certiorari, adopting the arguments articulated therein, and urge that the Petition be granted.

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